IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,
Petitioners,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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This reply is submitted by petitioners in response to the Memorandum filed by the United States as Amicus Curiae.

1. This Case Is Now Ripe For Review

The single most significant feature of this case, which is not disputed by the United States or by any party, is that it presents for review novel and substantial questions of national importance, principally involving the proper elements of the test for the non-statutory labor exemption from the antitrust laws. The United States admits that this has been "a vexing issue for decades", and that the contention of all parties "that the court [of Appeals] committed significant error in shaping this exemption" is "not without force".[1] Nevertheless, the United States suggests that review by this Court is premature because the Third Circuit's determination is interlocutory and because the validity under federal labor law of the collectively bargained provisions, challenged in this case under the antitrust laws, is unsettled.[2] Undoubtedly, these points were well known to the Court when it requested the views of the United States. Petitioners submit that the arguments set forth by the Government are precisely the reasons why this Court should review and settle the controversy at this time.

The United States does not maintain that this Court should not entertain review of this case. Instead, it suggests that its review be postponed, either by presently denying the petitions, or perhaps by holding them in abeyance pending the final adjudication of the related labor law

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[1] *See,* Memorandum for the United States as Amicus Curiae (hereinafter "U.S. Memo") at 4.

[2] *Compare International Longshoremen's Ass'n* v. *NLRB,* Nos. 77-1735, 77-1758 and 78-1510 (D.C. Cir. Sept. 25, 1979) *with International Longshoremen's Ass'n* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977). *See generally,* Pet. for Cert. in No. 78-1905 at 8, n. 6 and Supplemental Brief for Petitioners in Nos. 78-1902 and 78-1905.

litigation.[3] Petitioners submit that this suggestion is unsound and that this case is ripe for review now.

The attempt by the United States to apply ordinary principles of finality ignores the exceptional appellate treatment rendered to this case by the courts below. The substantial questions of law presented provoked both the District Court and the Third Circuit to grant the extraordinary remedy of an interlocutory appeal under 28 U.S.C. § 1292 (b). The § 1292(b) posture of this case conclusively establishes the propriety of immediate review to resolve "controlling question[s] of law as to which there is a substantial ground for difference of opinion".

The determination of these pure legal questions need not await a trial on remand. A trial would be concerned not with the soundness, wisdom and proper contours of the Third Circuit's labor exemption test, but rather with its *post hoc* application. There already exists a full and complete factual record germane to the exemption issue.

Nor does resolution of the antitrust issue presented by this case depend upon the ultimate outcome of the unsettled labor law litigation. The doctrine of labor exemption is not contingent upon an adjudication of the challenged labor contract under federal labor law. *Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 684-87 (1965). The effect of the Third Circuit's version of the exemption has universal application to all pending and future collective bargaining negotiations and agreements nationwide.[4]

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[3] *See,* U.S. Memo at 5.

[4] Apart from the issues relating to the appropriate test for the non-statutory labor exemption, this case also presents for review (1) the choice of the *per se* or rule of reason standard for adjudicating non-exempt labor agreements under the antitrust laws; (2) the standing of illegal business enterprises to seek re-

(footnote continued on following page)

2. Immediate Review Will Further The Public Interest

The approach counseled by the United States would thwart the objective of both the Court of Appeals and District Court for a final appellate resolution of the legal issues in this case to "materially advance the ultimate termination of the litigation". 28 U.S.C. § 1292(b). Until these issues have been dispositively determined by this Court, any further proceedings on remand to the District Court would be unaided by this Court's guidance and thus potentially wasteful. These protracted proceedings would ultimately have to be unscrambled and repeated in light of any reversal or modification by this Court if and when it later accepts this case for review after lengthy remand and second appeal.

More importantly, however, the resolution of the substantial questions of federal law in this case will directly and materially prevent volatile labor-management confrontations in a vital national industry. For more than two decades labor and management in the longshore industry have grappled with the difficult problems of job security and work preservation occasioned by technological job displacement. Many lengthy longshore strikes in 1959, 1962, 1964, 1968, 1971, 1975 and 1977 on the East and Gulf Coasts of the United States were the direct result of the parties' contention over these thorny issues. These strikes had a harmful and irreparable impact upon the national economy.

(footnote continued from preceding page)

dress under the antitrust laws and under LMRA § 303; (3) the propriety of collateral estoppel; (4) violations of due process and/or Rule 56 of the Federal Rules of Civil Procedure in the granting of summary judgment; (5) misconstruction of the purely compensatory nature of LMRA § 303; and, (6) the appropriate statute of limitations applicable to LMRA § 303. *See*, Pet. for Cert. in No. 78-1905 at 2-3, 17-20; Pet. for Cert. in No. 78-1902 at 12-23. These important issues are completely unrelated to the ultimate adjudication of the merits of any peripheral NLRB litigation.

The decision of the Court of Appeals in this case places bargaining parties, such as petitioners, in the perilous position of determining, in the midst of heated labor negotiations, whether the bargain arrived at represents the "least restrictive alternative". According to the Third Circuit, a wrong answer exposes them to treble damages. This dilemma radically alters not only the forthcoming 1980 negotiations in the longshore industry on the East and Gulf Coasts, which will commence in the Spring of 1980, but labor negotiations nationwide. Consequently, the potential for labor strife in the longshore and other collective bargaining negotiations has been heightened substantially.

It is thus within the public interest for the Court to grant certiorari at this time. If the Court prefers not to decide this case at this juncture, petitioners respectfully urge that, at the very least, it should grant certiorari and hold this case in suspension pending the final outcome of the labor law litigation.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Dated: New York, New York
December 6, 1979

Respectfully submitted,

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